

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER JOSEPH WATTS,

Defendant and Appellant.

C059486

(Super. Ct. No.
07F09879)

Convicted by jury of making a criminal threat and possessing cocaine for sale while armed, and sentenced pursuant to the "Three Strikes" law to 17 years in state prison, defendant appeals. He asserts that the judgment must be reversed because of instructional, sufficiency of evidence, due process, and sentencing errors. Finding no prejudicial error, we affirm.

PROCEDURE

Defendant was charged by information with four felony counts: count one, assault with a semiautomatic firearm; count two, making a criminal threat; count three, possession of a

firearm by a felon; and count four, possession of cocaine for sale.

As potential enhancements, the information alleged that defendant personally used a firearm in committing counts one (assault with a firearm) and two (making a criminal threat) and that defendant was armed with a firearm in committing count four (possession of cocaine for sale). The information also alleged that defendant was convicted of armed robbery, a serious felony, in 1998.

A jury found defendant not guilty of count one (assault with a semiautomatic firearm) and count three (possession of firearm by a felon). It found defendant guilty of count two (making a criminal threat) but found not true the personal firearm use allegation. And it found defendant guilty of possessing cocaine for sale, along with the allegation that he was armed with a firearm. The trial court found the prior conviction allegation true.

The trial court sentenced defendant to the middle term of four years on count four (possession of cocaine for sale), which term was doubled to eight years because of the prior serious felony, and the court added a consecutive middle term of four years for the arming enhancement. The court imposed a concurrent term of two years for count two (making a criminal threat) and a consecutive term of five years for the prior conviction. The aggregate term imposed was 17 years in state prison.

FACTS

Because of the contentions made by defendant on appeal, we segregate the prosecution evidence into two categories: the testimony of Andria Booze and the remaining evidence. We also summarize defendant's testimony.

Testimony of Andria Booze

Booze is defendant's wife.

Booze had been a crack cocaine dealer, but she stopped selling in July 2007. She introduced defendant to crack cocaine dealers in Sacramento. Booze provided money to defendant, and he used the money to buy crack cocaine to sell. In October 2007, defendant had been selling crack cocaine, but Booze did not believe there were any drugs in their residence.

On October 15, 2007, Booze was living in a townhouse in Sacramento with defendant and their three children. Early in the morning, defendant awakened Booze and began arguing with her in the upstairs bedroom about a phone call that she had received on her cell phone. During the argument in the bedroom, defendant threw Booze down on the bed, held a butterfly knife to her neck, bit her on her forearm, and pushed her against the wall. Defendant yelled, over and over again: "Somebody is gonna die tonight."

Once free of defendant, Booze ran downstairs. Defendant pursued her, grabbed her by the hair, and pulled her back to the bedroom, upstairs. Defendant put a handgun on a table and said to Booze that she "better grab it first or he's gonna kill

[her]." Booze grabbed the gun and tried to pull out the magazine. Defendant took the gun from her and said: "[N]o, you gonna use it or give it to me." Defendant set the gun back down and told Booze that they were "gonna fight." Booze was crying and begging for her life.

Booze and defendant went downstairs again. He threatened to cut her with a knife from the kitchen. He told her to defend herself and put the gun to her head. When Booze screamed, defendant told her to stop or he was "really" going to kill her. Booze hit defendant's hand and the magazine fell out of the gun. She kicked the magazine under the stairs so that defendant could not see it. She was able to pick up the magazine and hide it in a pillow case.

As defendant and Booze were near the stairs, with defendant looking for the magazine, someone knocked at the door. Defendant and Booze looked at each other, and Booze answered the door. Three police officers were at the door. Defendant went upstairs.

Remaining Evidence

Malakia McCurdy was visiting her cousin next door to Booze and defendant on October 15, 2007. She awakened early in the morning and heard shouting (a male and a female) and things being knocked over. She awakened her cousin, and they listened through the wall to the noises. She heard a male voice asking about a phone call and repeatedly saying that somebody was going to die.

McCurdy tried to go back to sleep, but the shouting and fighting continued. She finally concluded that it sounded like the male was going to kill the female, so she called the police.

Officer Colleen Gray of the Sacramento Police Department responded to the townhouse where Booze and defendant were staying. Accompanied by two other officers, she knocked on the door, and Booze answered. Booze was upset, and she looked like she had been crying. Booze told the officers that defendant was in the residence and that he had a gun. Booze showed Officer Gray a bite mark on her arm.

Officers Jason Hewitt and Kelley Elliott participated in a search of the townhouse after defendant was arrested. In the upstairs bedroom, they found a handgun inside a green bag on the top shelf of the closet. The magazine was in the gun. Also in the closet, they found a butterfly knife. They found about 20 grams of cocaine on a dresser about four feet from the closet. The cocaine was packaged in more than 50 individual bindles. With the cocaine, there were narcotics paraphernalia and a digital scale.

The officers found a digital recording system downstairs. A camera was facing the front door.

Officer Andre Malott interviewed defendant, who waived his *Miranda* rights.¹ Defendant stated that the cocaine found in the

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

townhouse belonged to him, for personal use and for sale.

Defendant said he did not have a handgun.

Later, Officer Gray took Booze's statement. Booze said that she and defendant had been arguing about everything lately. Defendant had a knife and became upset because she had come home late, and defendant thought she should have been home watching the children. In the early morning, defendant, who had a gun, awakened Booze and told her that he would kill her, himself, and the children before he let her leave him. He put the gun down and told Booze that she had better get to the gun before he did. Booze was able to go downstairs, but defendant followed. He grabbed her by the hair and held the gun in her face. Booze knocked the magazine out of the gun and ran upstairs, where she put the magazine in a pillow case. Defendant followed her upstairs. He had a gun, a knife and a bat. The doorbell rang. Defendant asked Booze for the magazine, stating that he was not "going out like a sucker." But Booze did not give it to him.

Defendant's Testimony

Defendant testified. He admitted that he and Booze argued loudly, but he denied having a gun, knife, or bat during the argument. He said that he could have threatened Booze, even though he did not remember it. He did not recall biting her. Defendant admitted that the cocaine was his and that he possessed it for sale. Defendant also admitted that he knew there was a gun in the townhouse, but he denied knowing where in the townhouse the gun was placed.

DISCUSSION

I

Instruction on Accomplice Testimony

Defendant contends that there was evidence that Booze was an accomplice and, therefore, the trial court prejudicially erred by not instructing the jury that (A) accomplice testimony must be rejected if uncorroborated and (B) the jury should view an accomplice's testimony with distrust. We conclude that, even assuming the trial court erred by not giving the accomplice instructions, any error was harmless.

An accomplice is a person who may be prosecuted for the same offense charged against a defendant. (Pen. Code, § 1111; *People v. James* (1987) 196 Cal.App.3d 272, 284.) "When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices." (*People v. Frye* (1998) 18 Cal.4th 894, 965-966, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We need not determine whether there was sufficient evidence to establish whether Booze was an accomplice because we find that any error in failing to give the accomplice instructions was harmless. (*People v. Miranda* (1987) 44 Cal.3d 57, 100, overruled on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

A. *Corroboration of Accomplice Testimony*

"[Penal Code s]ection 1111 prohibits conviction on the testimony of an accomplice unless the testimony is corroborated by other evidence tending to connect the defendant with the commission of the crime. [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) "[E]ven where there is a failure to instruct on accomplice testimony, such error is harmless if there is sufficient corroborating evidence in the record. [Citation.]" (*Id.* at p. 215.)

Here, there can be no question that there was sufficient evidence to corroborate Booze's testimony with respect to the counts on which defendant was found guilty -- making a criminal threat and possessing cocaine for sale while armed. McCurdy testified that she heard defendant's threats through the wall. And defendant, himself, testified that the drugs were his and that he knew there was a gun in the townhouse.

B. *Viewing Accomplice Testimony with Distrust*

Instructions pursuant to Penal Code section 1111 advise the jury to view accomplice testimony with distrust and suspicion. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 967.) Failure to instruct the jury in this regard is harmless when there are other circumstances that would cause the jury to distrust the accomplice testimony, and based upon the entire record it is not reasonably probable that appellant would have received a better result had the instructions been given. (*People v. Miranda*, *supra*, 44 Cal.3d at p. 101; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 26.)

Here, the jury's verdicts showed that the jury distrusted Booze's testimony. Defendant states: "[I]t is clear that the jury very strongly distrusted Booze's testimony." We agree. If it had credited Booze's testimony, it would have found defendant guilty of the assault and firearm possession charges. The not guilty verdicts on those charges are evidence that the jury did not trust Booze.

The trial court instructed the jury using CALCRIM No. 226, which informed the jury that, in assessing the credibility of a witness's testimony, the jury should consider "factor[s] such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided." (CALCRIM No. 226.) It is apparent that the jury considered these factors with respect to Booze's testimony and found it untrustworthy.

We therefore conclude that it is not reasonably probable that defendant would have obtained a better result if the trial court had instructed the jury to view an accomplice's testimony with distrust.

II

Arming Enhancement Instructions

The jury found true the allegation that defendant was armed when he committed the offense of possession of cocaine for sale. (Pen. Code, § 12022, subd. (c).) Defendant contends that the standard instructions given with respect to the firearm use enhancement of the cocaine possession count were improper because (1) they did not inform the jury that the firearm had to

have a facilitative effect with respect to the possession crime, (2) they did not require that the jury find that defendant knew the location of the firearm in the residence, and (3) the instructions' syntax shifted the focus away from defendant's actual conduct and intent. The contention is without merit.

A. *Instructions*

The trial court used CALCRIM No. 3131 to instruct the jury concerning the arming enhancement, as it related to the possession of cocaine count. As given, the instruction stated, in pertinent part:

"A person is *armed* with a firearm when that person: [¶] 1. Carries a firearm or has a firearm available for use in either offense or defense; [¶] AND [¶] 2. Knows that he is carrying the firearm or has it available for use." (Original italics.)

The trial court gave an additional instruction as recommended in the use notes of CALCRIM No. 3131. The additional instruction stated:

"If the People have proved that a firearm was found close to the cocaine base in a place where the defendant was frequently present, you may but are not required to conclude that: [¶] 1. The defendant knew the firearm was present; [¶] 2. It was not accidental or coincidental that the firearm was present together with the drugs; [¶] AND [¶] 3. During at least part of the time that the defendant allegedly possessed the illegal drugs, he had the firearm close at hand and available for immediate use to aid in the drug offense. [¶] If you find

beyond a reasonable doubt that the evidence supports these conclusions, you may but are not required to conclude that the defendant was personally armed with a firearm in the commission of possession for sale of cocaine base."

The additional instruction is based on the Supreme Court's holding in *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*).)

During deliberations, the jury sent the trial court a note stating: "Guidance to common sense or reasonable doubt to the charge of Count 4 in second part of possession of firearm linked to the drugs. Question is whether or not defendant possessing the firearm knowing it is that close (exact location) or is it defendant's knowledge that it is in the house."

The trial court responded: "As to the first part of your question, in order to find the additional allegation in instruction 3131 to be true, the People are required to prove beyond a reasonable doubt that the defendant knowingly carried a firearm or had it available for offensive or defensive use. In addition, please read additional jury instruction [CALJIC No.] 17.16.2 which further clarifies the instruction"

The trial court gave the jury CALJIC No. 17.16.2, as follows: "A defendant who unlawfully possesses cocaine base and maintains that substance in proximity to a firearm, in a place that he frequents, is armed with that firearm if you find beyond a reasonable doubt that, [¶] 1. The defendant knew of the presence of the firearm; [¶] 2. The presence of the firearm, together with the cocaine base, was not accidental or coincidental; [¶] and [¶] 3. At some point during the period of

illegal possession of cocaine base, the defendant was present with both the cocaine base and the firearm so that the firearm was available for the defendant to put to immediate use to aid in the unlawful possession of the cocaine base."

B. *Analysis*

In *Bland*, the court summarized the principles involved in an arming enhancement as follows: "[W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of [Penal Code] section 12022." (*Bland, supra*, 10 Cal.4th at pp. 1002-1003, fn. omitted.)

Defendant's assertions arise from *Bland's* additional statement that there must be a "facilitative nexus" between the drugs and the guns, such as is required in federal statutes, which we need not cite here. The *Bland* court concluded: "[T]he firearm must have some purpose or effect with respect to

the drug trafficking crime; its presence or involvement *cannot be the result of accident or coincidence.*' [Citation.]"

(*Bland, supra*, 10 Cal.4th at p. 1002, original italics.)

Later, in *People v. Pitto* (2008) 43 Cal.4th 228 (*Pitto*), the Supreme Court revisited the "facilitative nexus" language in *Bland* and stated: "*Bland* made clear that it did not impose an 'intent requirement' under [Penal Code] section 12022, or provide that the purpose with which the gun was placed near the drugs negates the 'facilitative nexus' that arming requires.

(*Bland, supra*, 10 Cal.4th 991, 1003, fn. 5.) We adhere to this view. When (1) a defendant, while perpetrating a drug offense, knows of the presence and location of a firearm near the drugs, (2) the proximity of the gun to the drugs is not the result of mere accident or happenstance, and (3) the defendant is in a position to use the gun offensively or defensively to aid in the commission of the offense, the gun facilitates that crime and has the requisite purpose or effect with respect to its commission." (*Pitto, supra*, 43 Cal.4th at pp. 239-240.)

It is within this context of a "facilitative nexus" requirement that defendant makes his arguments concerning the propriety of the instructions given to the jury to help it resolve the arming allegation.

1. Facilitative Nexus

Defendant argues that the court's instructions "failed to inform the jury that the ultimate determination they had to make was that the presence of the gun had an actual facilitative effect with respect to the crime." Defendant additionally

argues that the court's answer to the jury's question about the application of "'common sense'" to the determination of whether defendant was armed was inadequate because the court did not discuss the "link" between the drugs and the gun. We conclude that the instructions were proper pursuant to *Pitto*.

In *Pitto*, the court made it clear that the "facilitative nexus" discussed in *Bland* is established by the defendant's knowledge of the presence and location of the gun, the nonaccidental nature of the proximity of the gun to the drugs, and availability of the gun for use. (*Pitto, supra*, 43 Cal.4th at pp. 239-240.) Nothing more is required. In other words, the trial court need not use the words "facilitative nexus" and need not expand the definition in some way to require some other showing of the nexus.

The instruction originally given to the jury, based on CALCRIM No. 3131, apprised the jury that essential elements of the arming enhancement were that the gun was available for use and that defendant knew it was available. The instruction, based on CALJIC No. 17.16.2, given in response to the jury's question, clarified that a true finding on the enhancement allegation required the jury to find that the gun's presence with the cocaine was not accidental or coincidental.

These instructions properly apprised the jury that there must be some facilitative nexus between the gun and the cocaine.

2. Location of Firearm

Defendant argues that the instructions "failed to specify that [defendant] had to know not only the presence of the gun in

the house, generally, but also it's [sic] 'location[.]' While we agree that *Bland* and *Pitto* require that the defendant know the location of the gun, we disagree that the instructions given here were deficient in that regard.

Three times in the court's instructions concerning the arming enhancement, the court informed the jury that it must find that defendant either carried the gun or had it available for use. The requirement that defendant knew the location of the gun is implicit in these instructions. If he carried it or had it available for use, he knew where it was. If he did not know the location of the gun, the jury could not find that he carried it or had it available for use. Defendant could not avail himself of the use of the gun unless he knew where it was. (See *People v. Mendival* (1992) 2 Cal.App.4th 562, 575 [availability implies knowledge of firearm's location].) Therefore, the trial court's instructions to the jury effectively required the jury to find that defendant knew the location of the gun before it could find true the enhancement allegation.

3. Focus on Defendant's Conduct and Intent

Finally, defendant asserts that the instructions were defective because of "recourse to a syntax that shifted the focus away from [defendant's] conduct and toward the purely objective fact of the gun's spatial proximity and 'availability.'" To the contrary, there is nothing wrong with the syntax of the instruction.

As we already noted, the availability of the gun depended upon defendant's knowing where it was. But defendant asks: "Was it sufficient that the gun be there in a passive, objective state of availability, or was something more required?" (Original italics.) The answer to that question is no. Nothing more is required. In this respect, availability, along with the nonaccidental placement of the gun, provides the link that *Bland* and *Pitto* require between the gun and the drugs.

The court properly instructed the jury concerning the arming enhancement pursuant to Penal Code section 12022, subdivision (c).

III

Sufficiency of Evidence of Arming Enhancement

Defendant contends that the evidence was insufficient to support the true finding on the arming enhancement with respect to count four (possession of cocaine for sale) because "the jury rejected the other gun allegations and found that [defendant] had never actually or constructively possessed the gun" and because there was insufficient evidence independent of Booze's testimony. We disagree.

When a defendant asserts that the evidence was insufficient to sustain the verdict, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557,

578.) Substantial evidence includes circumstantial evidence and the reasonable inferences flowing from it. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.)

"[W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of [Penal Code] section 12022." (*Bland, supra*, 10 Cal.4th at pp. 1002-1003, fn. omitted.)

A. Jury "*Findings*"

"It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) "An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. [Citations.]" (*Ibid.*) "'Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a

reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient.' [Citation.]" (*Ibid.*)

Even though the jury found defendant not guilty of being a felon in possession of a firearm and found the firearm enhancement relating to the criminal threats count not true, those findings have no bearing on whether there was sufficient evidence to support the true finding on the arming enhancement attached to count four. Accordingly, defendant's argument that the evidence was insufficient because the jury rejected the other firearm allegations in the complaint is without merit.

B. *Nonaccomplice Testimony*

Defendant asserts that, disregarding Booze's testimony, the evidence was insufficient to support the arming allegation attached to count four. The assertion is unpersuasive.

Defendant admitted that he possessed the cocaine for sale. The cocaine was found on a dresser in the master bedroom. About four feet away from the cocaine, the loaded handgun was found on the top shelf of the closet. From the proximity of the gun to the drugs, the jury could infer that defendant possessed the gun in the commission of the possession count. Supporting this inference was defendant's admission that he knew that there was a gun in the residence. The jury was not bound to accept defendant's self-serving testimony that, although he knew of the gun's presence in the townhouse, he did not know where it was located.

We therefore conclude that the evidence was sufficient to support the jury's finding that defendant was armed in the commission of possession of cocaine for sale.

IV

Arming Enhancement Instruction as Argumentative

Defendant contends that the trial court's instruction pursuant to *Bland*, which it gave in addition to CALCRIM No. 3131, was prejudicially argumentative. He claims that the discussion of the inferences that the jury could draw from the evidence was essentially a "pre-argument" of the prosecution's case. We conclude that the instruction, based on the wording found in *Bland*, was not argumentative.

The trial court must not give the jury an argumentative instruction. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135-1138.) "An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. [Citation.] 'A jury instruction is [also] argumentative when it is "'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]'" [Citation.]" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244.)

Here, the trial court gave an instruction suggested in CALCRIM No. 3131's use notes. The court instructed: "If the People have proved that a firearm was found close to the cocaine base in a place where the defendant was frequently present, you may but are not required to conclude that: [¶] 1. The

defendant knew the firearm was present; [¶] 2. It was not accidental or coincidental that the firearm was present together with the drugs; [¶] AND [¶] 3. During at least part of the time that the defendant allegedly possessed the illegal drug[s], he had the firearm close at hand and available for immediate use to aid in the drug offense. If you find beyond a reasonable doubt that the evidence supports these conclusions, you may but are not required to conclude that the defendant was personally armed with a firearm in the commission possession for sale of cocaine base."

Contrary to defendant's argument, this instruction was not argumentative. It did not recite facts taken from the evidence and invite the jury to draw inferences favorable to the prosecution. Instead, similar to many other proper instructions, it informed the jury concerning the types of inferences that *may* be drawn if the jury finds certain facts to have been established. For example, the Supreme Court recently reiterated that instructions informing the jury that it could infer consciousness of guilt if it found that defendant fled or suppressed evidence were not impermissibly argumentative. (*People v. Friend* (2009) 47 Cal.4th 1.) The instruction suggested in the use notes of CALCRIM No. 3131 is no different. It does not impermissibly invite the jury to draw inferences from specified items of evidence; instead, it informs the jury concerning what inferences can be drawn from facts found by the jury.

Imposition of Greater Sentence After Trial

Before trial, defendant agreed to a plea bargain, pursuant to which he would plead no contest to count two (making a criminal threat) and count four (possession of cocaine for sale) and, in exchange, he would be sentenced to no more than 14 years four months in state prison. However, when the trial court asked defendant to admit, or to plead no contest to the allegation that he used a gun in making the criminal threat, which admission was a condition of the plea agreement, defendant refused to make the admission. The plea bargain therefore was ineffective, and defendant went to trial on the charges. After trial before a different judge, defendant was convicted of the same two crimes that were the subject of the plea bargain. However, the jury found not true the allegation that he used a gun in making the criminal threat. The trial court sentenced defendant to an aggregate state prison term of 17 years.

On appeal, defendant contends that imposing a state prison term greater than the term that would have been imposed pursuant to the plea bargain violated his right to due process. The contention is without merit.

A court may not punish a defendant more harshly for exercising the right to trial. (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279; *People v. Collins* (2001) 26 Cal.4th 297, 307.) However, the mere fact that a more severe sentence is imposed after trial than had been offered during plea negotiations does

not itself support the inference that the defendant has been penalized for the exercise of a constitutional right. (*People v. Szeto* (1981) 29 Cal.3d 20, 35 (*Szeto*).) In *Szeto*, the defendant was offered a sentence with no jail time in return for a guilty plea, but upon exercising his right to trial was sentenced by a different trial judge to four years in prison, with two years stayed. (*Id.* at pp. 34, 35.) Our Supreme Court held that the defendant could not prevail on a claim that the trial court penalized defendant for exercising his right to jury trial where the defendant admitted the trial court did not say anything reasonably giving rise to the inference that he was penalizing defendant for exercising his right. (*Id.* at p. 35.)

Here, as in *Szeto*, there is no indication that the sentencing judge was penalizing defendant for going to trial or even that the sentencing judge was aware of the prison term offered in the plea negotiations. Thus, defendant was not penalized for exercising his constitutional right to jury trial.

Defendant also asserts that he was found less culpable after trial than he would have been found pursuant to the failed plea bargain, and yet he was sentenced to a longer term in state prison. This assertion, however, also does not establish that he was penalized for exercising his right to jury trial. The quasi-plea bargain did not impose a lid on eventual sentencing after jury trial.

VI

Motion to Strike Prior or Reduce Current Crime

Before sentencing, defendant made a motion to strike his prior serious felony (a *Romero* motion) and to reduce the criminal threat crime to a misdemeanor. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968 (*Alvarez*).) The trial court denied the motions and sentenced defendant pursuant to the Three Strikes law, doubling the sentence on count four (possessing cocaine for sale) from four years to eight years in state prison. On appeal, defendant contends that the denial of the *Romero* motion, as well as the motion to reduce the criminal threat crime to a misdemeanor, was an abuse of discretion based on (1) the staleness of the prior serious felony, (2) the circumstances of the prior and current crimes, (3) his current good character, and (4) demands of justice. The contention is without merit.

A. *Romero Proceedings*

In support of his motions to strike the prior and to reduce the criminal threat crime to a misdemeanor, defendant submitted evidence about his prior serious felony and his past, generally. Defendant was a good student until the family moved to Chicago. Because the grading system was different there, he dropped out of high school and eventually obtained his GED certificate. He worked at several jobs after he dropped out of high school and completed two years of community college. In 1996, several friends were killed in an apartment fire. In 1997, his

grandmother died of cancer, and his great-grandmother was killed in an accident. Also that year, his brother was injured in a drive-by shooting, and his cousin was killed. Defendant was traumatized by the events of the year and withdrew emotionally.

During the same year, 1997, in October, when defendant was 18 years old, he went with two others to a gas station, wearing masks, and robbed the station. One of the principals used a gun. Defendant was convicted and sentenced to eight years six months and served six years in Illinois custody for the crime, receiving his release in 2004. He moved to California in 2004, and he and his wife, Booze, had three children. (The children were in the townhouse at the time of defendant's current crimes.) Defendant was not lawfully employed at the time of his current crimes.

Defendant participated in the Volunteers in Parole program after coming to California and received a favorable letter of reference from his mentors.

The trial court thoroughly analyzed on the record defendant's arguments for striking the prior serious felony conviction. The court noted the favorable letter of reference from his Volunteers in Parole mentors and commented that defendant committed the armed robbery after a series of tragic incidents in his life. However, concerning defendant's assertion that the prior conviction was remote in time, the court noted that defendant was incarcerated until 2004 and was only out for three years when he committed the current crimes.

After mentioning these facts, the court stated: "I look at [defendant's] character and, again, I think the fact that he has such good resources in the community leads me to believe that he was living some kind of double -- double life. He wasn't being particularly honest and maybe he didn't reach out when he should have." The court continued: "So when I consider all of those circumstances, I think it weighs more heavily towards not striking the prior, and if this had been ten years, if it had really been ten years, I think I would have likely had stricken the strike. It wasn't ten years. It was really three years. And it's troubling that when I consider the circumstances of the current offense, that his children who [sic] he professes to love and I think does love were in a situation where the potential for violence was great. Drug dealing and being armed is not a safe occupation. And these are very young children who should not have been put in that situation by [defendant and Booze]. And as a man, he has the obligation to protect his children, and I think having three young children in that home where there are drugs and there's a gun and surveillance equipment is something that weighs very heavily in my thinking about the background and character of [defendant]." Based on this reasoning, the trial court denied the *Romero* motion.

Concerning the motion to reduce the criminal threat crime to a misdemeanor, the trial court said that defendant's criminal threat came in a "long, drawn out period . . . of threatening conduct and behavior and words by [defendant] such that [witness McCurdy] decided to call the police because she was so concerned

that somebody was going to be killed” The court therefore denied the motion to reduce the crime to a misdemeanor.

B. *Analysis*

Penal Code section 1385 gives the trial court authority, on its own motion or upon application of the prosecution, “and in furtherance of justice,” to order an action dismissed. (Pen. Code, § 1385, subd. (a).) In *Romero*, the California Supreme Court held a trial court may rely on Penal Code section 1385 to strike or vacate a prior strike for purposes of sentencing under the Three Strikes law, “subject, however, to strict compliance with the provisions of [Penal Code] section 1385 and to review for abuse of discretion.” (*Romero, supra*, 13 Cal.4th at p. 504.) Likewise, a trial court’s “failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard.” (*People v. Carmony* (2004) 33 Cal.4th 367, 374.)

In ruling on a *Romero* motion, the trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Dismissal of a strike is a departure from the sentencing norm. Therefore, in reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) Reversal is justified when the trial court was unaware of its discretion to strike a prior strike, or refused to do so at least in part for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

Similarly, the denial of the motion to reduce the criminal threat crime to a misdemeanor is reviewed for abuse of discretion. "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.]' [Citation.]" (*Alvarez, supra*, 14 Cal.4th at pp. 977-978.)

Here, the trial court did not abuse its discretion in denying the motions to strike the prior and to reduce the criminal threat crime to a misdemeanor. Although there was evidence of mitigating circumstances in committing the prior crime and some evidence of good character, the trial court was justified in concluding that defendant was essentially leading a double life -- leading others to believe that he was reforming, while at the same time committing felonies. In addition, his children were present in the household when he engaged in this dangerous conduct.

Defendant, however, contends that the trial court was wrong in some of its conclusions. The arguments are unpersuasive.

1. Staleness of Conviction

Defendant claims that the trial court erred by considering the time between the prior serious felony and the current crimes as only three years when it was really 10 years. To the contrary, the trial court was very clear that it was discounting the time defendant spent in custody. There was no misconception concerning the length of time between defendant's crimes.

2. Aggravating and Mitigating Circumstances

Although defendant concedes that the trial court imposed a lighter sentence than it could have, he argues that the court erred by considering nonexistent aggravating circumstances and by improperly disregarding mitigating circumstances. Specifically, defendant contends the trial court improperly considered the danger to defendant's children and the "long, drawn out" nature of the criminal threat.

Defendant claims that his armed drug possession and criminal threats did not endanger his children and, even if they did, that was not a fact found by the jury. The claim is unfounded. Defendant endangered his children by engaging in dangerous felonies in this residence. Although defendant weakly cites *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], for the proposition that the trial court could not rely on facts not found by the jury, those cases apply only when the trial court used a fact not found by the jury to impose a sentence above the prescribed range for the crime found by the jury. (*Apprendi v. New Jersey, supra*, at p. 490.) Here, there is no such problem.

Concerning the trial court's comment about the "long, drawn out" nature of the criminal threat, defendant cites to testimony by witness McCurdy that there were threats and then two hours of silence before she heard more threats. We see no significance in the fact that there was a period of silence. The trial court was correct in determining that this was not just one, isolated threat. The threats continued over a period of time.

3. Character

Construing the evidence of his character in the light most favorable to himself and ignoring the bad character evidence, defendant asserts that the trial court erred in denying the motions to strike the prior and to reduce the criminal threat crime to a misdemeanor because he is a good person. He claims that the "selling of drugs was not part of some nefarious and

mal intended [sic] double life." Suffice it to say, the trial court had the better argument.

4. Justice

Finally, defendant asserts that "the ineffable but all-important quality of justice calls for a sentence far less than that given in this case." For this proposition, he provides no authority, just more arguments noting the evidence favorable to himself. This argument falls well short of establishing an abuse of discretion.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.